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No. 98-360

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

ROBERT CHAMBERS, et al.,
Petitioners,

v.

OHIO DEPARTMENT OF HUMAN SERVICES, et al.,
Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions identified in the petition, 42 U.S.C. 1396r-5 also is relevant to the disposition of this case. The full text of the statute is set forth in the Appendix.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Sixth Circuit's Fact-Bound Application Of Pendent Appellate Jurisdiction Does Not Warrant Review.

A. There Is No Lower-Court Conflict of Authority.

Petitioners contend that the Sixth Circuit improperly assumed jurisdiction over the district court's order of July 13, 1995, arguing that the issues decided in the order could not be reviewed in an appeal from an injunction issued on December 14, 1995. While acknowledging that the court of appeals could have reviewed both orders in an appeal from a final judgment, they contend that the Sixth Circuit improperly applied the doctrine of pendent appellate jurisdiction to review the two orders together.

In criticizing the Sixth Circuit's application of pendent appellate jurisdiction, petitioners fail to address the leading decision from this Court -- *Swint v. Chambers County Commission*, 514 U.S. 35 (1995). *Swint* allows pendent appellate jurisdiction when the appealable and non-appealable issues are "inextricably intertwined," or where review of the non-appealable decision is necessary to ensure meaningful review of the appealable one. The lower courts, like the Sixth Circuit, have carefully hewed to this rule. *See, e.g., In re Tutu Wells Contamination Litigation*, 120 F.3d 368, 382 (3rd Cir. 1997); *Rendall-Speranza v. Nassim*, 107 F.3d 913, 917 (D.C. Cir. 1997); *Paige v. California*, 102 F.3d 1035, 1039-1040 (9th Cir. 1996); *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996); *Kincade v. City of Blue Springs*, 64 F.3d 389, 394 (8th Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996); *Woods v. Smith*, 60 F.3d 1161, 1166 n.29 (5th Cir. 1995), *cert. denied*, 516 U.S. 1084 (1996); *Moore v. City of Wynnewood*, 57 F.3d 924, 930

(10th Cir. 1995); *Kaluczky v. City of White Plains*, 57 F.3d 202, 206-207 (2nd Cir. 1995). As the Eleventh Circuit observed in *Dolihite v. Maughon by and through Videon*, 74 F.3d 1027, 1034-35 n.3 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 185 (1996), "[e]very circuit to address *Swint's* reference to 'inextricably intertwined' issues has concluded that such pendent jurisdiction exists."

Nor do the cases cited by petitioners support a contrary view. *Buckhanon v. Percy*, 708 F.2d 1209 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984), and *Merrell-National Laboratories, Inc. v. Zenith Laboratories, Inc.*, 579 F.2d 786 (3rd Cir. 1978), by no means demonstrate a split in the circuits. In both cases the litigants failed to comply with Fed.R.App.P. 3(c) by specifying the earlier order in their notice of appeal, which by itself is dispositive. More: neither case involved a later order that incorporated an earlier one. Indeed, *Percy* was later distinguished on this ground by the Seventh Circuit, which also embraces the "inextricably intertwined" standard. *See Goodinez v. Lane*, 733 F.2d 1250, 1255-56 (7th Cir. 1984). Likewise, *Merrell-National* cannot be read to establish a rule precluding application of pendent appellate jurisdiction in the Third Circuit, in light of subsequent cases in the same circuit that have endorsed this approach. *See In re Tutu Wells Contamination Litigation*, 120 F.3d at 382 (3rd Cir. 1997).

B. The Sixth Circuit Correctly Applied The "Inextricably Intertwined" Standard.

The Sixth Circuit properly found that the issues determined in the July order were "inextricably intertwined" with the notice requirements set forth in the December injunction. Thus the court found this case to be "especially appropriate" for the exercise of pendent appellate jurisdiction. *Chambers*, 145 F.3d at 797. The court was right.

The district court's July 13th legal conclusions concerning the spousal impoverishment provisions formed the foundation for the December injunction. Both orders (each issued at petitioners' insistence) were "inextricably intertwined" and accordingly could be reviewed together. This approach was endorsed by the Court last Term in *Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636, 1651 n. 41 (1997), was established in *Swint* and has been endorsed by at least ten federal courts of appeals, including the Sixth Circuit. A fact-bound application of this doctrine does not warrant review.

II. The Medicaid Laws Do Not Require a "Resource First" Policy for Assuring Adequate Monthly Income for a Community Spouse.

A. No Meaningful Split Of Authority Exists.

The only authorities that support petitioners' arguments on the merits are the decision of the district court in this case, later reversed by the Sixth Circuit, and two isolated administrative appeal decisions from lower Ohio appellate courts. *See Kimnach v. Ohio Dept. of Human Services*, 96 Ohio App.3d 640, 645 N.E.2d 825 (Ohio Ct. App. 1994), *mot. overruled*, 71 Ohio St.3d 1447, 644 N.E.2d 409 (1995); *Gruber v. Ohio Dept. of Human Services*, 98 Ohio App.3d 72, 647 N.E.2d 861 (Ohio Ct. App. 1994), *mot. overruled*, 71 Ohio St.3d 1493, 646 N.E.2d 468 (1995). These three decisions, however, hardly establish the kind of lower-court conflict of authority that warrants review. A trial court decision never establishes a split in authority with a later appellate ruling in the same case. As for the Ohio appellate court decisions, *Kimnach* and *Gruber*, petitioners are currently involved in a parallel

state-court action in Ohio that will determine the extent, if any, that these decisions remain relevant.

In contrast to these rulings, all others follow the Sixth Circuit's view, holding that an "income first" policy is a permissible one under the Medicaid laws. *See, e.g., Cleary v. Waldman*, 959 F.Supp. 222 (D.N.J. 1997), *appeal pending* (3rd Cir.); *In the Matter of Golf v. New York State Department of Social Services*, 91 N.Y.2d 656, 674 N.Y.S.2d 600, 697 N.E.2d 555 (1998); *Thomas v. Commissioner*, 682 N.E.2d 874 (Mass. 1997). Petitioners also admit that the court below was the first federal appellate court to consider this issue. Pet. at 8. There thus is little reason to consider the merits issue now. Additional percolation of the issue in the lower courts either will confirm the growing consensus that the "income first" policy is permissible or will eventually create the kind of substantive division of authority that warrants review.

B. The Sixth Circuit Correctly Interpreted the Medicaid Laws.

1. Ohio's "Income First" Policy is Consistent With the Statutory Scheme.

The court of appeals correctly found that §1396r-5 does not mandate a "resource first" rule for determining how a community spouse meets her monthly income needs. Had Congress intended a "resource first" rule and no other, it surely would have drafted the statute differently. As written, the law simply does not lend itself to such an unyielding interpretation. For example, why is the entire statutory scheme premised on an initial split of spousal resources, if as petitioners suggest transferring all (or nearly all) of a couple's resources to the community spouse is the rule rather than the exception? Were petitioners correct, it would make far more sense simply to

permit couples at the outset to transfer enough resources to bring the community spouse up to the monthly needs allowance (rather than through periodic resource allowance revision hearings). The Ohio rule, by contrast, gives content to every section of the statute. The statute also explicitly requires a determination by a hearing officer before additional transfers may be made -- a step made wholly superfluous by petitioners' position that transfers are automatic any time the existing resources of the community spouse are inadequate. The text of the provision, in short, supports Ohio's position.

Petitioners also contend (Pet. 19) that the circuit court "ignore[d]" 42 U.S.C. 1396r-5(b)(1), which provides that "no income of the community spouse shall be deemed available to the institutionalized spouse." The Sixth Circuit, however, did no such thing. It carefully considered subsection (b)(1), and noted that "there is no corresponding prohibition [for] attributing the institutionalized spouse's income to the community spouse." *Chambers*, 145 F.3d at 802, n.17.

Petitioners further submit (Pet. 19) that the Sixth Circuit's interpretation "renders meaningless" 42 U.S.C. 1396r-5(d)(1)(B), which provides that the community spouse monthly income allowance may be deducted from the income of the institutionalized spouse in calculating the amount of his income that will be paid to the nursing home. More specifically, petitioners submit that under the court of appeals' interpretation, the post-eligibility shift of the institutionalized spouse's income (required by the statute to bring the community spouse up to the monthly needs allowance) will never occur. *Id.* Not only is this false, but it also misses the point. The income that Ohio first accounts for under its interpretation is, in fact, the income that will be shifted post-eligibility each month as a monthly income allowance under subsection (d)(1)(B). There simply is no reason to use the formal transfer mechanisms of subsection (d)(1)(B) before eligibility, because

unlike resources a couple's income arrives month to month. In fact, it is petitioners' "resource first" approach that is more likely to limit the application of subsection (d)(1)(B), for under that approach a monthly income allowance will occur only when the income generated by all of a couple's resources (combined with the community spouse's own income) is inadequate to meet her monthly needs allowance. That frequently will not occur.

As the appellate court found, subsections (b) and (d) simply do not provide guidance regarding revision of the community spouse resource allowance under subsection (e)(2)(C). Instead, the court determined, subsections (b) and (d) "provide a framework for preserving income for the community spouse by limiting the amount of the eligible institutionalized spouse's income which must be used to pay medical expenses." *Chambers*, 145 F.3d at 802.

Petitioners further argue (Pet. 16-17) that income of the husband that can be made available to the wife for her support under subsection (d) must be ignored in determining whether to revise the resource allowance. This interpretation would permit an automatic allowance of whatever resources are necessary to generate sufficient income for the community spouse, a rule that could have been (but was not) specified in the statute. The history of the statute, moreover, shows that Congress intended precisely the opposite. After the Conference Committee rejected the Senate provision for automatic increases in the resource allowance, it explained that resource allowance adjustments were intended only when necessary to assure that the community spouse has income sufficient to meet the monthly needs amount "taking into account any other income

attributable to the community spouse." Conference Report, H.R. Rep. 100-661, 100th Cong. 2nd Sess. P.L. 100-360, p. 265, reprinted in 1988 U.S. Code Cong. & Adm. News 1043.

Ohio's interpretation also is consistent with the legislative balance struck by the 1990 amendments. The new laws attempt to reach a compromise on a complex social issue: To what extent should state and federal governments subsidize health care costs of those who can afford to pay them? On the one hand, the statute creates many categories of exempt assets and permits an initial split of nonexempt assets, both of which reveal a congressional design to shield some assets from the Medicaid laws. But, at the same time, the Act makes clear that it was primarily intended to serve the poor, not the well to do, and suggests that additional transfers of resources to the community spouse (beyond the initial split) were the exception and not the rule. *See* H. Rep. No. 100-105(II), 100th Cong., 2nd Sess., P.L. 100-360, p. 73, reprinted in 1988 U.S. Code Cong. & Admin. News 896 (the Medicaid laws are "an entitlement program for the poor," not a mechanism to "facilitate the transfer of accumulated wealth" for estate-planning purposes).

Petitioners next contend (Pet. 14) that by requiring depletion of the husband's share of the couple's resources before he can obtain Medicaid coverage, his wife could be left without sufficient income or resources to produce that income after the husband's death. But that does not establish that the language of the statute precludes an examination of any potential income allowances in determining adjustments to the resource allowance. Congress clearly contemplated this situation and dealt with it by establishing the minimum amount of community resources that had to be protected for the community spouse ($12,000), and by assuring that at least half of the total resources of the couple (up to $76,000 or a higher amount established by court order) would be preserved for her.

These resources are not impacted by the state's use of an "income first" policy in the hearing to consider a larger resource allowance, and they need not be used before the husband can establish and retain Medicaid eligibility. At any rate, the Medicaid laws are not the only federal laws that protect the income of surviving spouses. Under the Social Security laws, a surviving spouse is entitled to benefits at the same level as the deceased spouse's primary insurance amount, *i.e.*, at least at the same amount of benefits that the deceased spouse received prior to his death. 42 U.S.C. §§ 402(e) and (f); 20 C.F.R. § 404.338. Additionally, the Internal Revenue Code requires qualified retirement plans to have a qualified joint and survivor annuity and a qualified preretirement survivor annuity, both of which provide a life annuity to the surviving spouse upon the death of a vested participant. 26 U.S.C. § 401(a)(11)(A); 26 U.S.C. § 417.

2. Even If The Medicaid Laws Are Ambiguous On This Point, The Department's Interpretation Is Still A Permissible One.

Even if the Department's rule were not compelled by the language and purpose of the statute, the court of appeals correctly held that the "income first" rule was permissible. At the very least, there is statutory ambiguity on the point, making it appropriate to defer to administrative interpretations of the provision. That deference seems particularly appropriate here since agencies at both the federal and state level have embraced the rule.

In December 1993, the United States Department of Health and Human Services issued a regional opinion letter (No. 51-93) clarifying the role of hearing officers in raising the community spouse's monthly needs allowance via an administrative hearing. At that time, the federal agency stated

that the community spouse's monthly needs allowance first must be met by requiring the institutionalized spouse to increase the community spouse's monthly income allowance, which is to say the federal agency required an "income first" rule. Additional resources, under this ruling, could be transferred to the community spouse only if the institutionalized spouse lacked sufficient funds to increase the monthly income allowance.

In July 1994, the federal agency issued a second regional opinion letter (No. 22-94). In doing so, it modified the earlier transmittal, concluding that States have the option of using the "income first" rule or of applying another reasonable interpretation of the law until final regulations are issued. While the federal agency thus modified its position on the issue, it remained fixed in concluding that the "income first" rule remains a reasonable -- and entirely permissible -- interpretation of the Medicaid laws.

As the single Ohio agency responsible for implementing the Medicaid laws, the Ohio Department acted consistently with both transmittals -- and indeed relied on them in administering the statute. Drawing on the federal interpretation, as well as its own administrative expertise in this area, the Department also determined that the "income first" rule was a permissible one under 42 U.S.C. § 1396r-5.

Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984), requires deference to reasonable interpretations of federal laws promulgated by the agency that is responsible for administering them. If the statute is silent or ambiguous with respect to an issue, and the agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," that interpretation should not be disturbed "unless it appears from the statute or its legislative history that the accommodation is

not one that Congress would have sanctioned." *Id.* at 844. Contrary to petitioners' suggestions, *Chevron* applies even if an agency position has not been formalized through the rulemaking process. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

Measured against traditional principles of *Chevron* deference, Ohio's administrative interpretations should be upheld. If nothing else, the relevant Medicaid laws are ambiguous on the order in which a community spouse's income should be supplemented -- first by the institutionalized spouse's income, first by the institutionalized spouse's resources, or by some combination thereof. Under these circumstances, the Sixth Circuit properly deferred to the accumulated expertise of the state and federal agencies on the issue.

III. The Sixth Circuit's Application Of Ohio Collateral Estoppel Law Does Not Warrant Review.

Petitioners lastly argue that the Sixth Circuit erred in addressing the issues presented because they were previously decided by two state appellate courts. *See Kimnach v. Ohio Department of Human Services*, *supra*; *Gruber v. Ohio Department of Human Services*, *supra*. They contend that the doctrine of offensive collateral estoppel, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), prevents Ohio from showing that its policy is consistent with the Medicaid laws.

As an initial matter, petitioners have not established a lower-court split of authority on this point, or for that matter demonstrated the federal substance of the issue presented. Nor could they. The Sixth Circuit was asked to apply -- and did apply -- *Ohio* principles of collateral estoppel.

The Sixth Circuit also applied these principles of Ohio law correctly. In *Goodson v. McDonough Power Equipment*,

Inc., 2 Ohio St.3d 193 (1983), the Supreme Court of Ohio rejected the kind of offensive non-mutual collateral estoppel applied in *Parklane Hosiery*, relying on the general rule that mutuality of parties is a requisite to collateral estoppel. Moreover, even if the federal law of collateral estoppel somehow applied (which it does not), *Parklane* is still not applicable because non-mutual offensive collateral estoppel does not apply against the government. *See United States v. Mendoza*, 464 U.S. 154, 159 (1984).

CONCLUSION

For the foregoing reasons, respondents urge the Court to deny the writ.

Respectfully submitted,

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APPENDIX A

42 U.S.C. § 1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses.

(1) Supersedes other provisions. In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1)), the provisions of this section supersede any other provision of this title (including sections 1902(a)(17) and 1902(f) [*42 USCS § 1396a*(a)(17) and (f)]) which is inconsistent with them.

(2) No comparable treatment required. Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1902(a) [*42 USCS § 1396a*(a)(10) or (17)], require such treatment for other individuals.

(3) Does not affect certain determinations. Except as this section specifically provides, this section does not apply to-

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories.

(A) Application in States operating under demonstration projects. In the case of any State which is providing

medical assistance to its residents under a waiver granted under section 1115 [*42 USCS § 1315]*, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this title [*42 USCS §§ 1396* et seq.].

(B) No application in commonwealths and territories. This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services under PACE programs. This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1934(a)(7) [*42 USCS § 1396u-4*(a)(7)]) or under a PACE program under section 1934 or 1894 [*42 USCS § 1396u-4* or 1395eee].

(b) Rules for treatment of income.

(1) Separate treatment of income. During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income. In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d), except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property. Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides--

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property. In the case of a trust--

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this title [*42 USCS §§ 1396* et seq.] (including sections 1902(a)(17) and 1917(d) [*42 USCS §§ 1396a*(a)(17) and 1396p(d)]), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust--

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(C) Property with no instrument. In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one-half to the community spouse.

(D) Rebutting ownership. The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources.

(1) Computation of spousal share at time of institutionalization.

(A) Total joint resources. There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)--

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) Assessment. At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this title [*42 USCS §§ 1396* et seq.], the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2).

(2) Attribution of resources at time of initial eligibility determination. In determining the resources of an institutionalized spouse at the time of application for benefits under this title [*42 USCS §§ 1396* et seq.], regardless of any State laws relating to community property or the division of marital property--

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) (as of the time of application for benefits).

(3) Assignment of support rights. The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where-

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established. During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this title [*42 USCS §§ 1396* et seq.], no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined. In this section, the term "resources" does not include--

(A) resources excluded under subsection (a) or (d) of section 1613 [*42 USCS § 1382b*(a) or (d)], and

(B) resources that would be excluded under section 1613(a)(2)(A) [*42 USCS § 1382b*(a)(2)(A)] but for the limitation on total value described in such section.

(d) Protecting income for community spouse.

(1) Allowances to be offset from income of institutionalized spouse. After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1902(q)(1) [*42 USCS § 1396a*(q)(1)]), in an amount not less than the amount specified in section 1902(q)(2) [*42 USCS § 1396a*(q)(2)].

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1902(r) [*42 USCS § 1396a*(r)]).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined. In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which--

(A) except as provided in subsection (e), the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance.

(A) In general. Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds--

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981 [*42 USCS § 9902*(2)]) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent. For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of--

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance. The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g)).

(4) Excess shelter allowance defined. In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of--

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 5(e) of the Food Stamp Act of 1977 [*7 USCS § 2014*(e)]) or, if the State does not use such an allowance, the spouse's actual utility expenses, exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support. If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(e) Notice and fair hearing.

(1) Notice. Upon--

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse, each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B)), of the amount of any family allowances (described in subsection (d)(1)(C)), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f), and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing.

(A) In general. If either the institutionalized spouse or the community spouse is dissatisfied with a determination of--

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B));

(iii) the computation of the spousal share of resources under subsection (c)(1);

(iv) the attribution of resources under subsection (c)(2); or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2)); such spouse is entitled to a fair hearing described in section 1902(a)(3) [*42 USCS § 1396a*(a)(3)] with respect to such determination if an application for benefits under this title [*42 USCS §§ 1396* et seq.] has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance. If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A), an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance. If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse

resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse.

(1) In general. An institutionalized spouse may, without regard to section 1917(c)(1) [*42 USCS § 1396p*(c)(1)], transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined. In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which--

(A) the greatest of--

(i) $12,000 (subject to adjustment under subsection (g)), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1), or (II) $60,000 (subject to adjustment under subsection (g)),

(iii) the amount established under subsection (e)(2); or

(iv) the amount transferred under a court order under paragraph (3); exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders. If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1917 [*42 USCS § 1396p]* shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1)).

(g) Indexing dollar amounts. For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions. In this section:

(1) The term "institutionalized spouse" means an individual who-

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI) [*42 USCS § 1396a*(a)(10)(A)(ii)(VI)], and

(B) is married to a spouse who is not in a medical institution or nursing facility; but does not include

any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.